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Supreme Court, U.S.
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No. 03-950

In The

Supreme Court of the United States

BANKRUPTCY RECEIVABLES MANAGEMENT,

Petitioner,

v.

CHARLES and JULIE LOPEZ,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

Petitioner, Bankruptcy Receivables Management ("BRM"), hereby respectfully submits this Reply Brief.

Summary of Points

A. This case involves only issues of federal bankruptcy law, especially: Does a Chapter 7 debtor have a *Parker* retention "right"? Five circuits have flatly rejected the notion that any such right exists; four have held that it does or may exist under certain circumstances. Obligated to follow its circuit precedent, regardless of how erroneous it may now be shown to be, the Ninth Circuit panel below held that because the Debtors had a pre-existing *Parker* retention "right", there was no new consideration for the PDPRA,[1] and invalidated it on that basis. This Court will be asked to find, as five circuits have, that the Debtors had no such "right" to discharge their debt to BRM and continue to retain the Property, and thus that it was clear legal error for the PDPRA to be declared invalid on that basis.

B. The damaging effects of the now full evolution of such a "right" are clearly manifested in this case in at least two important respects. Because this "right" has been judicially created at the circuit level, only this Court can provide the relief to which BRM is entitled – reversal of the Ninth Circuit's invalidation of the PDPRA.

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[1] Terms defined in the Petition have the same meanings here.

A. The Central Issue is Whether the Debtors Had a *Parker* Retention "Right"

Contrary to vague contentions suggesting otherwise in the Brief in Opposition, the Ninth Circuit below did, in fact, focus exclusively on rights and prohibitions under the Bankruptcy Code, and nothing else. Indeed, it said so itself: "Because the agreement [the PDPRA] is invalid under federal bankruptcy law, there is no need to review the agreement pursuant to California contract law." *Bankruptcy Receivables Management v. Lopez*, 345 F.3d 701, 710 (9th Cir. 2003) (App. 18). Again, using the court's own words, it framed the issue as follows:

> This case addresses the question of whether a creditor may enforce a post-bankruptcy discharge agreement entered into with a debtor retaining the collateral pursuant to its ***rights*** under *McClellan Fed. Credit Union v. Parker (In re Parker)*. . . . (emphasis added).

Lopez, 345 F.3d at 703.

The principal issue this Court will be asked to decide is whether the Debtors had any such *Parker* retention "right". *McClellan Fed. Credit Union v. Parker*, 139 F.3d 668 (9th Cir. 1998). The Ninth Circuit below observed: "In *Parker*, we noted that the circuits were evenly split on whether . . . a debtor may retain the property . . . without reaffirming the debt. This disagreement among the circuits . . . continues to exist." *Lopez*, 345 F.3d at 707. Five courts of appeal, applying the "plain meaning" of Bankruptcy Code §521(2) (mandating that a debtor perform certain duties), have categorically rejected the notion that any such unexpressed retention "right" exists. They have held that a Chapter 7 debtor has entirely no right to discharge his debt to a secured creditor and continue to retain its collateral without either reaffirming that debt or

redeeming such collateral. The Ninth Circuit, however, held that, although not specifically provided by Congress, the Debtors had just such a "right" to discharge their debt to BRM and yet retain its secured property without performing anything under §521(2).

This supposed "right", which has been careening about and doing damage in consumer bankruptcy cases for more than a decade now, has had the specific adverse and litigation-engendering effects pointed out in BRM's petition. Petition at 22-30. Contrary to the standard the Debtors in their Brief in Opposition suggest for this Court's consideration of cases for review, no case can or will represent all of the adverse consequences flowing out of a *Parker* retention "right". That is no reason not to accept this case for review. As briefly explained below, more than adequately represented in this case are both a primary and a secondary adverse consequence, however, and the Court's taking up of this matter and determining whether such a "right" exists will result in substantial relief to BRM here and in a full resolution of all of the adverse consequences emanating from such a "right".

1. Nullification of Consideration

The Ninth Circuit panel below was bound by *Parker* to find that the Debtors had a pre-existing *Parker* retention "right" to retain the Property simply by continuing to make payments. BRM's forbearing from exercising its surviving *in rem* rights and repossessing the Property, and its permitting the Debtors to retain its collateral through the PDPRA thus provided no new consideration, said that court, thereby invalidating the PDPRA:

> BRM's supposed consideration, forbearing its foreclosure right in exchange for the repayment of the discharged debt, is hardly additional consideration because under *Parker* the Lopezes were entitled to retain the jewelry and continue to make payments.[2]

Lopez, 345 F.3d at 710. BRM contends that the Debtors had no such *Parker* retention "right", and would commend to the Court the First Circuit's decision in *In re Burr*, 160 F.3d 843 (1st Cir. 1998) (App. 107), which decisively discredits the notion that any such "right" exists. Since no such pre-existing retention "right" existed, BRM's agreement through the PDPRA to permit the Debtors to retain the Property did, indeed, provide ample consideration and the Ninth Circuit's invalidation of the PDPRA represents clear error of law. This alone warrants granting the Petition.

This case compellingly illustrates just how far reaching the damaging effects can be over time when a circuit court (particularly in a highly-recurring setting[3]) creates for an individual Chapter 7 debtor a previously non-existent "right" and, without then recognizing the various consequences later ensuing from its proclamation, projects that supposed "right" into Congress' balanced, comprehensive and inter-related Bankruptcy Code. Here, a *Parker* retention "right", which five circuits say simply does not

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[2] The Ninth Circuit ignored the fundamental fact, admitted by the Debtors, that the Debtors had not continued to pay BRM.

[3] There were more than 1,155,000 individual Chapter 7 filings in 2003, according to statistics compiled by the Administrative Office of United States Courts.

exist, has had the effect of nullifying that which was heretofore recognized to be legal consideration.

This Court can and should determine that no such highly-dubious retention "right" exists and with that restore the long-accepted view embraced by this Court, which the decision below effectively undercuts, that surviving *in rem* rights provide independent consideration that may support a forbearance agreement such as the PDPRA. See *Johnson v. Homestate Bank*, 501 U.S. 78, 83, 111 S.Ct. 2150, 2153, 115 L.Ed 2d 66 (1991) ("Notwithstanding the discharge, the [secured creditor's] right to proceed . . . *in rem* survived the Chapter 7 liquidation).

Upon determining that no such "right" exists, debtors in the Ninth Circuit and elsewhere, desiring to retain secured property, will, as Congress intended, choose to either redeem that property, or, more likely, enter into binding, bankruptcy court-supervised reaffirmation agreements with their secured creditors, rather than routinely rejecting such Congressionally sanctioned agreements, just as the Debtors did here.

2. Re-establishing Established Law and "Cleaning Up the Environment"

The alternative basis for the Ninth Circuit's invalidating the PDPRA was that it was a "disguised" reaffirmation agreement, with the court finding that because the amount expressed in the PDPRA was roughly equivalent to the amount of the discharged debt, the consideration for the PDPRA ***was*** the discharged debt. Because the PDPRA did not comply with Bankruptcy Code §524(c) (dealing with the requisites of a reaffirmation agreement, reaffirming a discharged debt), it was declared invalid.

As explained in the Petition (p. 27), that equivalence will always exist in such a post-bankruptcy agreement where, as here, the surviving *in rem* rights (generally, the value of the collateral), which provide the independent consideration for such an agreement, exceed the amount of the discharged debt.

The Ninth Circuit, required to follow the altogether defective construct of *Parker* under which virtually no such agreement, however valid it might be, could be squared or reconciled with *Parker*, declared it invalid as violative of §524(c). That provision, however, is implicated and can only be violated where the consideration for the agreement is the discharged debt. Here, the consideration was not the discharged debt but BRM's surviving *in rem* rights. And where, as here, those *in rem* rights exceeded the discharged debt, the amount expressed in the PDPRA, of necessity, would indeed be in the amount of (or close to) the discharged debt, since a creditor may realize on its *in rem* rights in an amount up to the debt, whether it has been discharged or not.

The Ninth Circuit never addressed the point that the value of the Property exceeded the discharged debt (nor that the PDPRA – anticipating this very misguided contention – openly recited that it was ***not*** a reaffirmation agreement). Badly blurring this Court's distinction in *Johnson v. Homestate Bank* between a discharged debt and the *in rem* rights that may be realized upon up to the amount of such debt, the Ninth Circuit came to the altogether simplistic, knee-jerk conclusion that because the amount set forth in the PDPRA was roughly equivalent to the amount of the discharged debt, the consideration for the PDPRA ***was*** the discharged debt. The Ninth Circuit's analysis on this point, shadowed as it was by *Parker*, was

incomplete, imprecise and manifestly wrong, and, with its summarily-made conclusion, represents a second clear error of law, which this Court can and should reverse.

Finally, it must be emphasized that this issue arises and, until resolved by this Court similar such embarrassingly-abundant post-bankruptcy disputes and litigation will continue to arise, chiefly because in the environment fostered by *Parker* virtually no reaffirmation agreements are entered into between Chapter 7 debtors and their secured creditors in the Ninth Circuit (or other "fourth option" circuits). The inevitably on-going post-bankruptcy communications and dealings between those parties thus wind up being carried out in an uneasy, uncertain, agreement-less, litigation-engendering void, which is entirely at odds with the certainty that Congress intended and plainly provided for in Bankruptcy Code §521(2). Despite this highly in-conducive post-*Parker* environment, the PDPRA was and remains perfectly valid and enforceable, and, as this Court will find, did not run afoul of even the Ninth Circuit's misguided view of federal bankruptcy law.

Respectfully submitted,

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